THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC. , Plaintiff, v. PC TOOLS PTY, LTD., Defendant.	No. 07-CV-00797 JCC **DEFENDANT'S OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER**

I. INTRODUCTION

In its filings in this case, Plaintiff Zango, Inc. portrays itself as a responsible corporate citizen that has distributed benign software to millions of computer users around the world who have actively sought out and voluntarily chosen to use Zango's programs on their computers. Zango paints a story that it is being severely victimized by leading anti-spyware software maker PC Tools, which, Zango alleges, wrongfully detects Zango's adware on users' computers and notifies users that Zango's software has risks. Zango concludes that PC Tools' improper conduct has caused Zango over $35 million in damages in just 45-60 days, and requests that the Court promptly order PC Tools to stop detecting all of Zango's programs so that immediate and irreparable harm to Zango's "good reputation in the marketplace" – which Zango has "worked hard to achieve" – can be avoided.

Nothing could be further from the truth.

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II. STATEMENT OF FACTS

A. ZANGO (F/K/A 180SOLUTIONS)

What Zango does not mention anywhere in its filings is that no more than 90 days ago, it finalized a settlement with the United States Federal Trade Commission ("FTC") that resolved a formal complaint and investigation into charges that Zango (formerly known as "180solutions"):

- Used unfair and deceptive practices to surreptitiously download adware (which monitors users' Internet use to display pop-ads) onto computers of unsuspecting users; and
- Obstructed users' efforts to remove Zango's unwanted adware

In the FTC proceeding, it was estimated that Zango's adware was downloaded onto computers over 70 million times, resulting in over *6.9 billion* pop-up ads. Zango agreed to pay a $3 million fine for ill-gotten gains and agreed to strict controls and continuing oversight over its adware business. The FTC decided to go forward with the settlement even though citizen watchdog groups warned that Zango continued its illicit conduct after signing the agreement triggering the consent orders. *See generally*, http://www.ftc.gov/opa/2006/11/zango.shtm.

Importantly, Zango's deceptive acts were not limited to the distribution of its adware. Before entering into the consent decree, Zango had repeatedly stated in court filings that it was not a purveyor of malware. Indeed, back in November 2005, Zango filed a lawsuit against another anti-spyware provider, Zonelabs, LLC, which was classifying Zango's software as "high risk" malware. In its Complaint, Zango claimed that its software programs were not spyware, but instead were "consent-based applications that are carefully designed to protect the user's privacy." *See* Saad Declaration, Ex. 1 at ¶ 3.14. Zango simply dropped the case a few months later without disposition or settlement. Also in November 2005, Zango answered a class-action complaint filed against it and denied that its software was spyware. *See* Saad Declaration, Ex. 2 at 3.

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Barely four months later, the FTC filed its complaint alleging that Zango's software was not "consent-based" and was malicious adware. Less than a year later, Zango agreed to the consent decree, the $3,000,000 fine, the strict controls over its business, and continued oversight of its adware business going forward.

Zango's well-publicized wrongdoings have been the subject of much public study and comment. *See* Saad Declaration, Ex. 3 (articles discussing Zango and its business practices). PC Tools submits with this brief the Declaration of Benjamin Edelman, a noted expert in malware and anti-malware operation, conflict and policy. Edelman has studied Zango's software since 2003. In his Declaration, Edelman provides short summaries of Zango's software, its damaging effect on people's computers, Zango's sordid company history, the resulting public outcry, Zango's continued non-compliance with its FTC consent decree, PC Tools' current treatment of the three programs Zango puts at issue in this case, and the public policy implications of this case on consumers and the computer security software industry.

PC Tools also submits with this brief the Declaration of John Sarapuk, its Chief Operating Officer. In his Declaration, Sarapuk more fully explains the facts summarized below.

B. PC TOOLS

Defendant PC Tools is an Australian company with around 150 employees based in Sydney, Australia. PC Tools flagship product is a leading anti-spyware software product called Spyware Doctor. PC Tools' core business is detecting and informing computer users of potentially harmful software (generically referred to as "malware"), including the type of adware purveyed by Zango.

Spyware Doctor regularly receives Editors' Choice awards from PC Magazine. In addition, after leading the market in 2005, Spyware Doctor was awarded the prestigious Best of the Year from PC Magazine at the end of 2005. Spyware Doctor continues to be awarded the highest honors by many of the world's leading PC publications such as PC Pro, PC Plus, PC

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Authority, PC Utilities, PC Advisor, PC Choice, Microdatorn, PC Answers Magazine, plus a number of reputable 5-star ratings including CNET's Download.com and Tucows.

The success of Spyware Doctor is also reflected in the marketplace. Spyware Doctor has been downloaded over 100 million times, and it continues to be downloaded approximately a million times every week. Spyware Doctor Starter Edition recently was selected to be included in the "Google Pack," which is comprised of several leading software programs that can be downloaded for free from Google's website.

To stay on top of rapidly evolving threats to computers, PC Tools has a dedicated team of software analysts in a unit it calls the "Malware Research Centre" in Sydney, Australia. The MRC engineers review all shapes and sizes of software from myriad sources to identify and categorize risks to the security of a user's computer. These analysts use – but by no means rely exclusively on – the AntiSpyware Coalition's Best Practices, which recently was adopted as guidance by a consortium of the leading anti-spyware companies in the world. The MRC team considers a significant number of important factors, as seen in the Sarapuk Declaration, paragraph 7.

After comprehensive analysis, the MRC team assigns a level of risk to software using the following terms: Info & PUAs (Potentially Unwanted Applications) presenting no known risks; Low Risk; Medium Risk; Elevated Risk; and High Risk. Information concerning the software and its associated risk level is then loaded into PC Tools' "detection database." When Spyware Doctor subsequently runs on a user's computer, Spyware Doctor communicates with the detection database, and signatures to detect any new threats (or reclassified threats) are downloaded to the user's computer. PC Tools informs its users that malware is constantly changing and evolving, and therefore infection risk levels may be updated without notice at any time.

The development and distribution of Spyware Doctor is based on the premise that PC Tools will continuously monitor third-party software for possible threats to the security of a

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user's computer on a daily basis. PC Tools' reputation in the marketplace rests entirely on developing and maintaining consumer trust that PC Tools will analyze and stay updated or ahead of third-party software presenting the latest computer security threats, will thoroughly study and assign an appropriate level of risk to such threats, and will notify users of such threats and such that they can choose to remove and/or block such software threats from their computer.

Towards that end, PC Tools does not accept any compensation or benefits from third-party software providers in exchange for a certain classification of their software. PC Tools maintains an independent position, with its own protocols and decision-making. Maintaining this independence in the face of pressure by third-party software providers is one of the reasons PC Tools has the reputation of an industry leader.

C. PC TOOLS' HISTORICAL CLASSIFICATION OF ZANGO SOFTWARE

In the past, PC Tools classified all of Zango's programs as malicious with a High or Elevated risk classification. Beginning in late 2004, Zango contacted PC Tools and requested that PC Tools reclassify Zango's programs such that they were not detected. PC Tools explained that its own independent analysis showed numerous, repeated and serious problems with Zango's software. Over the course of the next 18 months, Zango periodically contacted PC Tools and requested reclassification.

On several occasions, Zango made representations about the new and improved characteristics of its software. Each time, PC Tools evaluated Zango's representations and found them to be false and deceptive because the software still contained harmful security threats.

Zango went so far as to victimize PC Tools itself. For example, visitors to PC Tools' website and the Spyware Doctor purchase page would find a page for competing products and/or rogue ("fake") anti-malware products cleverly overlaid on top with the same colors, fonts and text used by PC Tools. PC Tools discovered similar deception by Zango with respect to Symantec and MacAfee web pages (two other noted software security firms).

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During this time period, PC Tools learned that Zango was the subject of the FTC investigation and complaint. The FTC's allegations against Zango included that it was using unfair and deceptive methods to download adware and obstruct consumers from removing it, in violation of U.S. law. Obviously this was of great concern to PC Tools, and materially impacted (if not completely eliminated) PC Tools' ability to reclassify Zango's software.

Analysis and reclassification of the three Zango programs at issue has been complicated by the fact that the MRC team has observed components in the three programs that also were contained in Zango's malicious "legacy" malware. This required subdividing and assigning multiple and separate signature sets for threats; at times as many as 17 different components needed to be analyzed individually and collectively within Zango's software.

It is with this context and history that PC Tools has been extremely cautious with respect to the classification of Zango's software. Even recently, PC Tools has observed ongoing troublesome characteristics in Zango's software. *See* Sarapuk Declaration at ¶ 20, including Exhibit 3 attached thereto.[1] Zango tries to make much ado about a statement it extracts from a 40-page chain of emails, claiming that PC Tools' employee Jim Meem somehow has admitted that Zango's programs are harmless. A simple review of the entire chain of emails before the statement, after the statement, and within the very email from which Zango isolates and extracts the statement, plainly shows there were many qualifiers to Meem's statement and that in no way was Meem's statement a proclamation that Zango's programs were without risk. *See* Sarapuk Declaration, ¶ 19, including Exhibit 2 thereto.

D. PC TOOLS' CURRENT CLASSIFICATION OF ZANGO SOFTWARE

On or before May 14, 2007, before Zango filed its lawsuit, PC Tools made the independent decision to reclassify three of Zango's software programs (Seemko Search Assistant, Zango Search Assistant, and Hotbar) as PUAs (potentially unwanted applications). As

[1] PC Tools respectfully notifies the Court that one of the pages included in this exhibit necessarily includes a screenshot of a pornographic image captured during evaluation of Zango's software.

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a separate and independent matter, PC Tools also decided to modify Spyware Doctor to allow for PUAs to avoid being detected and removed by Spyware Doctor's auto-scan function (On Guard). This change was implemented by the introduction of Spyware Doctor 5.0.0.185. This was not a Zango-specific decision; it was a business and policy decision by PC Tools that applied to all programs classified as PUAs.

As a result, the three Zango programs that Zango has put at issue are no longer detected and removed by Spyware Doctor's On Guard auto-scan function because they are classified as PUA. If a user chooses not to use On Guard, and instead performs a manual scan, the user can choose whether to keep the three Zango programs or not.

Regarding Spyware Doctor Starter Edition as included in the Google Pack, as of May 30, 2007, new users downloading the Google Pack receive Spyware Doctor version 5.0.0.185. Benjamin Edelman has independently confirmed that fact. *See* Edelman Declaration, at ¶¶ 48-50. (Previously, users downloading the Google Pack received Spyware Doctor version 5.0.0.184, which then was automatically updated to Spyware Doctor version 5.0.0.185 through a silent update that, if required, notified the user a reboot was required to apply the updates.) Existing users of Spyware Doctor Starter Edition as included in the Google Pack received this same update back on May 22, 2007. PC Tools informed Zango of this fact shortly thereafter. (Indeed, at all relevant times, PC Tools voluntarily notified Zango of PC Tools' policy changes, and at all relevant times Zango would have been able to see such changes in practice.)

Furthermore, the Spyware Doctor Starter Edition as included in the Google Pack has a Global Action List "white list" function. This allows users to specifically list programs as permitted programs, regardless of any classification made by PC Tools (even if PC Tools later reclassified Zango's programs to an elevated or high risk). Spyware Doctor does not immunize and forever prevent Zango's three programs from being loaded or maintained on the user's computer. The user always retains the ultimate decision-making authority and ability to allow software programs on its computer.

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Other computer security software programs detect certain of Zango's programs as some form of malware, with each security program ascribing its own classification system and nomenclature to the Zango programs. For example, Microsoft detects a Zango program and labels it a moderate risk. Symantec detects Zango Search Assistant as Low risk. Computer Automation detects a Zango program Very Low risk. Sunbelt rates Zango as one of the Top Ten Spyware Threats. And so on. Screenshots of various other security software products' detection and labeling of Zango's programs are attached to the Sarapuk Declaration as Exhibit 4.

E. HARM TO PC TOOLS SHOULD AN INJUNCTION ISSUE

With respect to the classification of Zango's software, PC Tools has acted with one overriding motivation and goal – to preserve its reputation as a leading computer security software provider and to protect its users from potentially malicious software. PC Tools has not gained any revenue or other tangible benefit from labeling Zango's programs as malware in the past, and will not gain any such thing by doing so in the future. PC Tools does not market Spyware Doctor by stating that it detects Zango's programs, or by identifying any company's programs for that matter. PC Tools does not compete in the same market as Zango; the two companies offer separate and distinct products.

If PC Tools were ordered by an injunction to reclassify Zango's programs to what Zango preferred the classification to be, one of the most crucial pillars supporting PC Tools' business model would be removed. PC Tools no longer would be able to assure its end users that PC Tools is continuously and adequately monitoring third-party software (e.g., Zango's programs) for malware. Zango could modify its software after such an order, and PC Tools would be handcuffed by an injunction from providing its analysis and recommendations regarding computer security to its end users. In addition to the public being harmed by such a scenario, if such a precedent were set, other third-party software providers could file suit to litigate PC Tools' classification of their software. If they were able to obtain an injunction similar to that requested by Zango, the very nature of PC Tools' business would be eliminated because PC

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Tools' reputation would be irreparably damaged. Consumers could easily switch to one of many competitors in PC Tools' industry that was not prohibited from operating the very core of its business.

III. ARGUMENT

Injunctive relief is an extraordinary remedy issued at the discretion of a court, when there is a compelling need to maintain the status quo. *See Natural Resources Defense Council, Inc v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992). In deciding whether to issue a temporary restraining order, courts in the Ninth Circuit look to the following four factors: (1) the strong likelihood of success on the merits, (2) the threat of irreparable harm to the plaintiff if the injunction is not imposed, (3) the relative balance of harm to the plaintiff and harm to the defendant, and (4) the public interest. *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1388 (9th Cir. 1988). Alternatively, a plaintiff may show either (1) a combination of a strong likelihood of success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. *Johnson v. California State Bd. of Accountancy,* 72 F.3d 1427, 1430 (9th Cir. 1995) (citations omitted).

Rather than treat these two prongs as distinct standards, a court should construe them as "opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987) (internal citation omitted). However, "under th[e] last part of the alternative test, even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits." *Martin v. International Olympic Committee* 740 F.2d 670, 675 (9th Cir. 1984). "Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury." *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) (citation omitted). If the moving party fails to meet this "minimum showing," the Court "need not decide

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whether [the movant] is likely to succeed on the merits." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

Mandatory preliminary injunctive relief that goes beyond maintaining the status quo *pendente lite* is "particularly disfavored." *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994). For this reason, a heightened standard applies to requests for mandatory injunctive relief under which "the district court should deny such relief 'unless the facts and law clearly favor the moving party.'" *Id*. *See also Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (describing standard as "heightened"). Courts should be "extremely cautious" about issuing mandatory preliminary injunctive relief. *See Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984).

By its motion for temporary restraining order, Zango seeks mandatory injunctive relief. Zango requests that the Court order PC Tools to affirmatively change its Spyware Doctor software so that it does not contain any reference to Zango's software products and thus does not detect Zango's malicious adware in any way. Zango also requests that the Court order PC Tools to affirmatively send updated files to *all of PC Tools' customers*, which number is in the hundreds of millions. By trying to change the status quo rather than preserve it, Zango seeks a mandatory injunction, and its request for relief must be analyzed under the heightened standard. Zango cannot satisfy its burden under any of the standards and is not entitled to injunctive relief.

A. THERE IS NO LIKELIHOOD THAT ZANGO WILL SUCCEED ON THE MERITS OF ANY OF ITS CLAIMS.

1. THIS COURT DOES NOT HAVE PERSONAL JURISDICTION OVER PC TOOLS, AND VENUE IS IMPROPER.

PC Tools has filed a Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue either before or concurrently with this brief. Because the Court does not have personal jurisdiction over PC Tools, and because venue is not proper in this Court, it cannot grant injunctive relief. Accordingly, Zango's motion must be denied. *See Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) ("A federal court may issue an injunction if it has personal

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jurisdiction over the parties and subject matter jurisdiction over the claim."); *Paccar Intern., Inc. v. Commercial Bank of Kuwait, S.A.K.*, 757 F.2d 1058, 1066 (9th Cir. 1985) (vacating preliminary injunction because court did not have personal jurisdiction).

2. PC TOOLS' CLASSIFICATION DECISIONS ARE PROTECTED BY THE FIRST AMENDMENT.

PC Tools' identification and classification of all malware – including Zango's software products – is speech that is protected under the First Amendment. As such, the preliminary injunctive relief sought by Zango – a Court order requiring PC Tools to affirmatively change its software so that it does not contain any statements about Zango's software products and to provide an updated set of files without any statements about Zango's products to all of PC Tools' customers – would constitute an invalid prior restraint. The temporary restraining order requested by Zango runs afoul of the First Amendment and must be denied.

Under the First Amendment, a "prior restraint on expression comes . . . with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968)); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Indeed, prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

When a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994) ("Injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances."). An injunction must be obeyed until modified or dissolved, and its unconstitutionality is no defense to disobedience. *See Walker v. Birmingham*, 388 U.S. 307, 314-21 (1967). "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, [a] prior restraint 'freezes' it, at least for the time." *Nebraska Press Ass'n*, 427 U.S. at 559. In contrast, "a judgment…is subject to the whole panoply of protections

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afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative." *Id*.

Courts find it inappropriate to assess the truth or falsity of speech in the context of a motion for temporary restraining order. The reason for this is simple: "[t]he special vice of a prior restraint is that communication will be suppressed…before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). Instead, in the context of a motion for temporary restraining order, the threshold question is whether the speech is protected. If it is, the motion must be denied and a determination of the truth or falsity of the challenged speech must be left for the trial on the merits. *See New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1071, 1084 (C.D. Cal. 2003) ("once a jury has determined that a certain statement is libelous, it is not a prior restraint for the court to enjoin the defendant from repeating that statement") (quoting *Kramer v. Thompson*, 947 F.2d 666, 676 (3d Cir. 1991)).

The decision in *New.net, Inc. v. Lavasoft* is particularly instructive concerning this analysis. There, Lavasoft distributed an anti-spyware program called "Ad-Aware," which is the same type of product as PC Tools' Spyware Doctor in that each product's basic goal is to detect and notify users of risky software (malware) on their computers. Lavasoft offered a free basic version of Ad-Aware and consumers could purchase a more enhanced version.

The plaintiff in the case, New.net, Inc., provided software that at one time or another downloaded onto users' computers with little to no notice and without obtaining the consent of the users. Further, New.net's software at one time or another was a type of spyware known as a "dataminer," which software collects and stores information about end users' Internet browsing activities and then surreptitiously sends the information to a third-party for use in targeting users with advertisements. Before and during the lawsuit, New.net had apparently made changes to its

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software to eliminate its datamining functionality and to ensure that its software was not surreptitiously downloaded onto consumers' computers.

Based on this history, Lavasoft programmed Ad-Aware to detect New.net's software and inform users of the presence of the software. In the notification, Ad-Aware classified the "risk level" posed by New.net's software as "high."

In response to Lavasoft's classification of its software, New.net filed a lawsuit alleging claims for tortious interference with prospective business advantage, trade libel, unfair competition, and false advertising. As support, New.net "vigorously" disputed that its software at the time of the lawsuit was malware. New.net also moved for a preliminary injunction that would have required Lavasoft to change Ad-Aware so that it would either not detect New.net's programs or would provide a more benign informational warning to users.

The *Lavasoft* Court denied the motion for injunctive relief. At the outset, the *Lavasoft* Court stated that "the contest in this case is between computer users, who acquire software precisely to determine what programs they may have unsuspectingly loaded onto their hard drives, and New.net, which apparently needs the ability to deliver its program to as many unwitting users as possible to further its business plan." *Id.* at 1073. The Court then concluded that Lavasoft's practice of classifying New.net's software and informing users of its presence on their computers was speech that touched on a matter of public concern. *Id*. at 1083. In support of this conclusion, the Court noted that (1) "literally millions of individuals have sought out Lavasoft's software-basically its advice-about how to ensure their privacy and security on the Internet"; and (2) there was an ongoing "public debate over companies like New.net and how they do business over the internet." *Id*. at 1085-86.

Based on these conclusions, the Court held that Lavasoft's classification of New.net's software, and Lavasoft's communication of that classification to computer users, was speech protected by the First Amendment. The Court held that the injunction sought by New.net constituted an unconstitutional prior restraint and denied the motion for preliminary injunction.

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See also Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F. Supp. 2d 1035 (C.D. Cal. 1998) (concluding that safety review of Isuzu Troopers in Consumer Reports, and other print, broadcast, and Internet publications was protected speech); *Bihari v. Gross*, 119 F. Supp. 2d 309 (S.D.N.Y. 2000) (finding that website informing public of difficulties with plaintiff's interior decorating business was protected speech); *Taucher v. Born*, 53 F. Supp. 2d 464 (D.D.C. 1999) (holding that a regulation aimed at preventing dissemination of fraudulent investment advice constituted an impermissible prior restraint of speech rather than a valid regulation of a profession in that it barred conveyance of investment "advice and recommendations" to customers).

Here, as in *Lavasoft*, PC Tools' practice of classifying Zango's software and informing users that Zango's software resides on their computers is speech that touches on a matter of public concern. Further, as in *Lavasoft*, this conclusion is supported by (1) literally over a hundred million users who have sought out Spyware Doctor – PC Tools' advice – about how to ensure their privacy and security on the Internet and (2) the fact that there continues to be an ongoing public debate over companies like Zango and how they do business over the Internet as evidenced by the articles noted above and the classification of Zango's software as malware by numerous other anti-malware software providers. PC Tools' classification decisions and messages to users concerning Zango's software are protected speech.

Like New.net in *Lavasoft*, Zango is seeking preliminary injunctive relief that constitutes an invalid prior restraint. Zango has requested that the Court order PC Tools to affirmatively change its software so that it does not contain any statements concerning Zango's software products. This would eliminate Spyware Doctor's ability to detect Zango's products. Zango also requests that the Court order PC Tools to provide an updated set of files without any statements about Zango's products to all of PC Tools' customers. The proposed injunctive relief is not only in the nature of a disfavored mandatory injunction, it is an invalid prior restraint on PC Tools' protected speech.

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Zango's motion for temporary restraining order runs directly contrary to the protections afforded by the First Amendment, and therefore must be denied. *See New.net*, 356 F. Supp. 2d at 1071; *see also Pittsburgh Press Co.*, 413 U.S. at 390 ("[t]he special vice of a prior restraint is that communication will be suppressed…before an adequate determination that it is unprotected by the First Amendment."); *Kramer v. Thompson*, 947 F.2d 666, 676 (3d Cir. 1991) ("once a jury has determined that a certain statement is libelous, it is not a prior restraint for the court to enjoin the defendant from repeating that statement.").

3. ZANGO WILL NOT PREVAIL ON ITS TORTIOUS INTERFERENCE CLAIM BECAUSE PC TOOLS HAS NOT INTERFERED WITH ZANGO'S CONTRACTUAL RIGHTS OR BUSINESS EXPECTANCY AND HAS NEVER HAD AN IMPROPER MOTIVE.

Under Washington law, a claim for tortious interference with contractual rights or business expectancy requires proof of five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendant had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendant interfered for an improper purpose or used improper means; and (5) resultant damage. *Lounging v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288, 300 (1997). Intentional interference means purposeful improper interference. *Leingang*, 930 P.2d at 300; *see also Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989). And the interference must be improper – meaning interference with an improper objective or the use of wrongful means. *Id*.

Washington has adopted, in part, Restatement of Torts § 767, which provides guidance in determining whether a defendant has engaged in improper conduct sufficient to incur liability for a tortious interference claim. A court should analyze the following factors: (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between

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the parties. *Pleas*, 774 P.2d at 1163-64 (citing Restatement (Second) of Torts § 767 (1979)). All of these factors weigh in favor of PC Tools.

Here, assuming, *arguendo*, that Zango has a contractual relationship or business expectancy with its customers and that PC Tools had knowledge of this relationship, Zango cannot establish that PC Tools intentionally interfered with Zango's contractual or prospective relationships and that such alleged interference by PC Tools was improper. PC Tools' primary motive is to ensure that its users' computers are secure from malware. PC Tools is neither taking specific aim at Zango's software, nor attempting to wipe out Zango's operations. Instead, PC Tools makes a classification decision with respect to Zango's software that is just one out of tens of thousands of classification decisions made by PC Tools with respect to software programs it has analyzed. Restatement (Second) of Torts § 767 cmt c (indicating that courts are concerned with unlawful or fraudulent behavior that targets the plaintiff and only the plaintiff). As a result, because it is merely incidental that PC Tools' classification decisions impact Zango, Zango cannot establish that PC Tools is intentionally interfering with Zango's contractual relationships or business expectancy.

Further, PC Tools' classification decision with respect to Zango's software is not in any way improper. Instead, PC Tools has made its decision in response to overwhelming evidence that Zango's software has attributes of malware. Given Zango's long history of abuses and the elaborate steps PC Tools has taken to analyze and evaluate Zango's current software consistent with the AntiSpyware Coalition's Best Practices, it is beyond cavil that PC Tools' objective is not improper. This conclusion is confirmed by the fact that PC Tools is not the only anti-malware software provider that has classified Zango as potentially harmful; many other programs have done and continue to do the same. *See* Sarapuk Declaration, ¶ 26, including Exhibit 4 thereto.

Finally, the relations between the parties is not one of competition, but rather gatekeeper and intruder. PC Tools classification of Zango's software is one of tens of thousands that PC

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Tools conveys to its customers through Spyware Doctor. Thus, PC Tools does not benefit economically from informing its users of Zango's adware. Zango cannot succeed on the merits of its tortious interference claim.

Even if Zango could prove that all five elements were present, Zango's motion still fails because PC Tools' actions were privileged. *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 137-138, 839 P.2d 314, 322 (1992) (citing Restatement (Second) of Torts § 773). As explained above, PC Tools' classification decisions concerning Zango's software products constitute protected speech under the First Amendment. As a result, Zango cannot establish any likelihood that it will prevail on its tortious interference claim.

4. ZANGO WILL NOT PREVAIL ON ITS CONSUMER PROTECTION ACT CLAIM.

Under the Washington Consumer Protection Act, a plaintiff must prove five elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). As to the first element, the Act does not define the term "deceptive," but implicit in that term is "the understanding that the actor misrepresented something of material importance." *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev'd on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999). A plaintiff must show at a minimum that the act in question had the capacity to deceive a substantial portion of the public. *See Hangman Ridge Training Stables*, 105 Wn.2d at 785-86.

Here, there is no evidence – much less the clear evidence required for a mandatory injunction – that PC Tools' classifications of Zango's products were unfair or deceptive in any way. As explained above, while there is disagreement over the level of threat, virtually every anti-malware software provider agrees Zango's products pose some degree of risk to the security of users' computers. In fact, there are other anti-malware software providers currently classifying Zango's software products at a higher risk level than PC Tools. One (Sunbelt)

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recently labeled a Zango software program as one of the "Top Ten Spyware Threats." There is nothing unfair or deceptive about PC Tools' classification of Zango's software. Zango cannot establish any likelihood that it will prevail on its Consumer Protection Act claim.

5. ZANGO WILL NOT PREVAIL ON ITS TRADE LIBEL CLAIM BECAUSE PC TOOLS' SPEECH IS TRUTHFUL.

To establish a claim of product disparagement, also known as trade libel, a plaintiff must establish that the defendant (1) published a knowingly false statement harmful to the interests of another; (2) intended the publication to harm the plaintiff's pecuniary interests; and (3) does so with actual malice. Restatement (Second) of Torts § 623A; *Auvil v. CBS 60 Minutes*, 67 F.3d 816, 820 (9th Cir. 1995).

Here, as an initial matter, no Washington court has ever recognized the claim of trade libel. Instead, the Ninth Circuit has merely assumed that the Washington Supreme Court would recognize the claim based on the citation in a Washington Court of Appeals decision to Section 623A of the Restatement (Second) of Torts. *See Auvil*, 67 F.3d at 820. PC Tools respectfully submits that a mandatory injunction should not be entered based on a legal claim that has not been recognized in Washington beyond an assumption.

In any event, Zango cannot establish a strong likelihood of success on the merits. For example, given that virtually all anti-malware software providers agree that Zango's software poses some degree of threat to users' computers, Zango cannot establish that PC Tools' classification of Zango's software is a statement of fact, not opinion, and that such statement is knowingly false. Similarly, there is no evidence that PC Tools made its classification decision with "actual malice." Zango cannot establish any likelihood that it will prevail on its trade libel claim.

B. ZANGO WILL NOT SUFFER IRREPARABLE INJURY ABSENT AN INJUNCTION.

The actions taken by PC Tools to downgrade the classification of Zango's software to PUA already has eliminated the threat of irreparable injury unreasonably feared by Zango. As

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explained above in the Facts, on or before May 14, 2007, before Zango filed its lawsuit, PC Tools made the independent decision to reclassify three of Zango's software programs (Seemko Search Assistant, Zango Search Assistant, and Hotbar) as PUAs (potentially unwanted applications). As a separate and independent matter, PC Tools also decided to modify Spyware Doctor to allow for PUAs to avoid being detected and removed by Spyware Doctor's auto-scan function (On Guard). This change was implemented by the introduction of Spyware Doctor 5.0.0.185. This was not a Zango-specific decision; it was a business and policy decision by PC Tools that applied to all programs classified as PUAs.

As a result, the three Zango programs that Zango has put at issue are no longer detected and removed by Spyware Doctor's On Guard auto-scan function because they are classified as PUA. If a user chooses not to use On Guard, and instead performs a manual scan, the user can choose whether to keep the three Zango programs or not.

Regarding Spyware Doctor Starter Edition as included in the Google Pack, as of May 30, 2007, new users downloading the Google Pack receive Spyware Doctor version 5.0.0.185. Benjamin Edelman has independently confirmed that fact. *See* Edelman Declaration, at ¶¶ 48-50. (Previously, users downloading the Google Pack received Spyware Doctor version 5.0.0.184, which then was automatically updated to Spyware Doctor version 5.0.0.185 through a silent update that, if required, notified the user a reboot was required to apply the updates.) Existing users of Spyware Doctor Starter Edition as included in the Google Pack received this same update back on May 22, 2007. PC Tools informed Zango of this fact shortly thereafter.

Furthermore, the Spyware Doctor Starter Edition as included in the Google Pack has a Global Action List "white list" function. This allows users to specifically list programs as permitted programs, regardless of any classification made by PC Tools (even if PC Tools later reclassified Zango's programs to an elevated or high risk). Spyware Doctor does not immunize and forever prevent Zango's three programs from being loaded or maintained on the user's

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computer. The user always retains the ultimate decision-making authority and ability to allow software programs on its computer.

In support of its assertion that it is suffering unquantifiable irreparable harm, Zango has submitted two emails from customers. Certainly, if Zango was suffering immediate and irreparable harm based on Spyware Doctor removing Zango's programs from the computers of users who had consented to the download of Zango's programs, Zango would have received far more complaints. The paucity of evidence submitted by Zango indicates that Zango is not, in fact, being irreparably harmed by any action undertaken by PC Tools. Moreover, the emails themselves reveal that the users are having problems installing Zango's programs due to "problems with many of the Antivirus programs," that the users were willing to continue finding a work-around, that the users did not blame Zango at all, and that it was Zango (not the user) that was recommending a termination of their paid subscription.

C. THE INJURY TO PC TOOLS CAUSED BY AN INJUNCTION WOULD VASTLY OUTWEIGH ANY INJURY ALLEGEDLY BEING SUFFERED BY ZANGO.

The balance of hardships tips decidedly in favor of PC Tools and against Zango. With respect to the classification of Zango's software, PC Tools has acted with one overriding motivation and goal – to preserve its reputation as a leading computer security software provider and protect its users from potentially malicious software. If PC Tools is required by Court order to reclassify Zango's programs to what Zango prefers the classification to be, one of the most crucial pillars supporting PC Tools' business model would be removed. PC Tools no longer would be able to assure its end users that PC Tools is continuously and adequately monitoring third-party software (*e.g.*, Zango's programs) for malware. Zango could modify its software after such an order, and PC Tools would be handcuffed by an injunction from providing its analysis and recommendations regarding computer security to its end users.

In addition to the public being harmed by such a scenario, if such a precedent were set, other third-party software providers could file suit to litigate PC Tools' classification of their

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software. If they were able to obtain an injunction similar to that requested by Zango, the very nature of PC Tools' business would be eliminated because PC Tools' reputation would be irreparably damaged. Consumers could easily switch to one of many competitors in PC Tools' industry that was not prohibited from operating the very core of its business.

The impact of granting the order sought by Zango would be felt even beyond PC Tools' business. If makers of malicious and other risky software were allowed to obtain temporary restraining orders against anti-spyware companies in the nature of the order sought by Zango – in which anti-spyware companies were forced to affirmatively change their ratings, even temporarily – the computing public would be harmed by the potential for malware to freely implant on their computers. Because one of the hallmarks of malware is the incredibly difficult, if not impossible, task of removing its files from one's computer, the burden placed on the computing public is far too great to justify the issuance of injunctive relief.

Based on the foregoing, the balance of hardships tilts decidedly in PC Tools' favor, particularly in light of the extremely meager evidence submitted by Zango that any act undertaken by PC Tools has damaged and will continue to damage Zango.

D. ENTRY OF AN INJUNCTION WOULD BE CONTRARY TO THE PUBLIC INTEREST.

As seen from the Declaration of Benjamin Edelman, spyware is a substantial harm to typical consumer users. The National Cyber Security Alliance estimates that 61% of home computers are infected with at least one spyware program. Typical users have great difficulty removing spyware from their computers. Anti-spyware software like PC Tools' Spyware Doctor provides crucial assistance to keeping users' computers operational and reliable. Anti-spyware software therefore serves an important public function. Just as public policy is served by deferring to the editorial recommendations of ratings publications like *Consumer Reports*, public policy is served in this case by allowing PC Tools to continue its practice of independently analyzing and rating software programs like those nefariously distributed by Zango. Computer

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users are entitled to such protection over the profit motives of a company that recently extracted itself from an FTC investigation by disgorging "ill-gotten gains."

E. THE EQUITIES IN THIS CASE FAVOR AN ENORMOUS BOND.

Under the Federal Rules of Civil Procedure, the Court has discretion to require a bond in whatever amount serves the interests of justice. Fed. R. Civ. P. 65(c) (bond must be posted "in such sum as the court deems proper"). The amount of the bond "will generally be what the court deems sufficient to cover the losses and damages incurred or suffered by the party enjoined if it turns out that the injunction should not have been granted." *Dep Corp. v. Opti-Ray, Inc.*, 768 F. Supp. 710, 718 (C.D. Cal. 1991).

If an injunction issued, PC Tools would be placed at unquantifiable risk because (1) PC Tools no longer would be able to provide the service upon which its customers rely; (2) Zango could modify its software after such an order, and PC Tools could do nothing about it; (3) other third-party software providers would be emboldened to file suit to challenge PC Tools' classifications of their software; and (4) based on the foregoing, consumers likely would switch to one of many competitors in PC Tools' industry that are not shackled by an injunction.

PC Tools is a highly successful and valuable 150-employee company that very well could be destroyed if an injunction is entered. These factors justify the imposition of a sizeable bond – in the millions if not tens of millions.

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CONCLUSION

PC Tools respectfully requests that the Court deny Zango's Motion For Temporary Restraining Order and grant PC Tools all other relief to which it may be entitled.

Dated May 31, 2007

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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DATED: May 31, 2007 at Seattle, Washington.

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